

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

JULY - 7 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2007-0391-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
DAVID LYNN WESTMILLER,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-43695

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender  
By Joy Athena

Tucson  
Attorneys for Petitioner

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E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner David Westmiller was convicted in 1994 of two counts of child molestation. Westmiller filed a motion to disqualify “all” Pima

County Superior Court (PCSC) judges from hearing his case on the ground that one of the victims was the daughter of a Pima County probation officer. Pima County Judge Gilbert Veliz granted the motion. The case was then assigned to Judge Allen Minker of Greenlee County, who sentenced Westmiller to a partially mitigated, seven-year prison term on one count and suspended the imposition of sentence on the other count, placing Westmiller on a consecutive, twenty-year term of intensive probation.

¶2 Once Westmiller began his term of probation in 1999, it appears that both Pima County and federal probation officers monitored his progress. PCSC favorably modified the terms of Westmiller's probation in 1999 and 2001 and continued him on probation when a federal probation officer filed a petition to revoke his probation in 2003, all without objection from Westmiller. When a federal probation officer filed a second petition to revoke probation in 2006, Westmiller admitted to Judge Christopher Browning of PCSC that he had "possessed and had contact with and accessed via electronic communication devices sexually stimulating or sexually oriented materials" in violation of the special conditions of his sex offender probation. Judge Browning revoked Westmiller's probation and sentenced him to a presumptive, ten-year term of imprisonment. Westmiller then filed a notice of post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., followed by a petition in which he asked the court to vacate the ten-year sentence, based on the conflict of interest that allegedly existed, and "order that he be resentenced by a Greenlee County judge." The trial court denied Westmiller's petition, and this petition for review followed. We will not disturb a trial court's denial of post-conviction relief absent a clear

abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶3 Westmiller contends that, because he did not knowingly, intelligently, and voluntarily waive any conflict of interest with PCSC and the Pima County Adult Probation Department (PCAPD) that arose because the victim's mother was and apparently still is employed by the PCAPD, that conflict still exists and is the law of this case. He thus argues that Judge Browning abused his discretion by failing to grant post-conviction relief. He also suggests that, because he would have received a mitigated sentence from a Greenlee County judge, as he did in 1994, he has been prejudiced.

¶4 Judge Browning denied Westmiller's Rule 32 petition for the following reasons: (1) Judge Browning himself had no personal conflict of interest that would have prohibited him from presiding over this matter; (2) Westmiller did not file a timely motion for change of judge pursuant to Rule 10.1, Ariz. R. Crim. P.; and (3) the record does not support Westmiller's claim that he would have received a more lenient sentence from an out-of-county judge. Although the trial court did not abuse its discretion by denying Westmiller post-conviction relief, we deny relief, in part, for different reasons. *See State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court "will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons"). We do not agree with the trial court that the dispositive issue is whether Judge Browning had a personal bias against Westmiller rather than a general conflict with the entire PCSC judiciary or whether Westmiller filed a timely request for a change of judge pursuant to Rule 10.1. But

the court correctly found that Westmiller's claim had "been waived, abandoned and lost by virtue of his voluntary choice to proceed without objection."

¶5 In 1994, Judge Veliz disqualified PCSC based on a conflict of interest. But repeatedly thereafter, that order was disregarded. Westmiller appeared before PCSC on numerous occasions, including the recent probation violation proceedings, and did not object. He thereby implicitly waived any claim that PCSC could not hear this case because of the alleged conflict of interest, and he is precluded from asserting this claim now. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from obtaining post-conviction relief "based upon any ground . . . waived at trial," except claims expressly excepted from rule of preclusion pursuant to Rule 32.2(b)).

¶6 Nor has Westmiller established that a knowing, voluntary, and intelligent waiver was required before he could be deemed to have waived the conflict recognized by Judge Veliz in his 1994 ruling and the court's resulting disqualification. The right involved here—the right to have his case heard by a judge who does not have an arguable conflict of interest—was not of such constitutional magnitude that any waiver of the right had to be personal rather than implied before the claim could be deemed waived and precluded pursuant to Rule 32.2(a)(3). *See State v. Swoopes*, 216 Ariz. 390, ¶¶ 21, 42, 166 P.3d 945, 951, 958 (App. 2007) (unless defendant establishes right alleged is of sufficient constitutional magnitude, knowing, voluntary, intelligent waiver not required before claim can be regarded waived). Westmiller appeared in PCSC at repeated probation-related proceedings and did not object, maintaining his silence even when Judge Browning

specifically told him in 2004, “I’m going to order that this case remain with me for as long as I remain here on the bench so that I will have some recollection of the events and it not be passed off to a new judge if there is some subsequent proceeding.” He did not object when Judge Browning presided over the most recent revocation proceedings. Rather, he attended the revocation and disposition hearings, admitted he had violated the conditions of his probation, explained to Judge Browning that he was “sorry [he] didn’t finish [his] probation,” and agreed to the disposition of his personal property after sentencing, never requesting the case be assigned to a judge in another county. Notably, he remained silent even after his attorney commented to Judge Browning, in his presence, “[Y]ou probably know who the victims [in the underlying case] are and so do I.”

¶7 We likewise reject Westmiller’s argument that, once established, the conflict of interest could not be waived by mere acquiescence. He contends that his situation is analogous to conflicts under the Ethical Rules and the Code of Judicial Conduct, which he claims must be waived by the written, informed consent of the affected party. *See* ER1.7, cmt., Ariz. R. Prof’l Conduct, Ariz. R. Sup. Ct. 42; Ariz. R. Sup. Ct. 81, Canon 2, cmt. Unlike individuals in those situations, Westmiller had a specific mechanism to challenge this matter from proceeding in PCSC. The protections afforded by Rule 10.1, which Westmiller had initially employed and then implicitly waived, insulate defendants like Westmiller from this very situation.

¶8 Westmiller suggests he could not have raised this claim any earlier than he did because he “did not have a right to initiate Rule 32 proceedings until sentenced in a Superior

Court.” He did, however, have the right to object to proceeding in PCSC in 1999, 2001, 2003, 2004, and most recently in 2006. As the trial court noted in denying post-conviction relief, Westmiller objected “only when his continued failures on probation warranted the revocation of his probation.” As the state pointed out in its response to the petition below, “The defendant may not test the water before deciding whether or not to request a change of judge.” *State v. Munoz*, 110 Ariz. 419, 421, 520 P.2d 291, 293 (1974).

¶9 Nor is Westmiller’s failure to object excused, as he suggests, by the fact that Rule 32 contemplates a post-conviction proceeding will continue in the court in which the conviction and sentencing occurred. *See* Ariz. R. Crim. P. 32.3 and 32.4(e). Notwithstanding the rule, Westmiller nevertheless could have objected.

¶10 Accordingly, although we grant the petition for review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge